Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH E. SPANIOL, JR.
CLERK

Nos. 87-1365, 87-1409, 87-1419, 87-1446 and 87-1543

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH JOHN AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ANGELO LAPIETRA, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN PETER CERONE, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

MILTON JOHN ROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court's instruction that everyone is presumed to know what the law forbids and what it requires to be done constituted harmless error.

2. Whether the Double Jeopardy Clause forbids separate convictions and sentences for the offenses of conspiracy to violate the Travel Act, 18 U.S.C. 1952, and a substantive violation of the Travel Act.

3. Whether this Court's decision in *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), should be retroactively applied.

4. Whether the district court improperly precluded petitioner Rockman from offering evidence bearing on the admissibility of certain co-conspirator statements.

5. Whether a defendant who is indicted as an aider and abettor may be convicted as a principal pursuant to *Pinkerton* v. *United States,* 328 U.S. 640 (1946).

6. Whether the district court correctly instructed the jury on the law of conspiracy.

7. Whether the indictment sufficiently alleged violations of the Travel Act.

8. Whether there was sufficient evidence to support petitioner Cerone's conviction on one of the substantive Travel Act counts.

TABLE OF CONTENTS

	Page
Opinion below	2
Jurisdiction	2
Statement	2
Argument	7
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, 450 U.S. 333 (1981) 8
Armour Packing Co. v. *United States*, 209 U.S. 56 (1908) 18
Blockburger v. *United States*, 284 U.S. 299 (1932) 6, 8, 9, 10
Bourjaily v. *United States*, No. 85-6725 (June 23, 1987) .. 6, 11, 12
Callanan v. *United States*, 364 U.S. 587 (1961) 8
Hamling v. *United States*, 418 U.S. 87 (1974) 18
Pandelli v. *United States*, 635 F.2d 533 (6th Cir. 1980) ... 10
Pinkerton v. *United States*, 328 U.S. 640 (1946) 6, 10, 11, 14, 15, 16
Rose v. *Clark*, 478 U.S. 570 (1986) 7, 8
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985) 13
Turf Center, Inc. v. *United States*, 325 F.2d 793 (9th Cir. 1963) 19
United States v. *Alsobrook*, 620 F.2d 139 (6th Cir.), cert. denied, 449 U.S. 843 (1980) 16
United States v. *Austin*, 529 F.2d 559 (6th Cir. 1976) 10
United States v. *Bailey*, 444 U.S. 394 (1980) 18
United States v. *Bell*, 457 F.2d 1231 (5th Cir. 1972) 15
United States v. *Blackmon*, No. 86-1427 (2d Cir. Feb. 9, 1988) 12
United States v. *Bright*, 630 F.2d 804 (5th Cir. 1980) 16
United States v. *Brown*, 770 F.2d 768 (9th Cir.), cert. denied, 474 U.S. 1036 (1985) 18-19
United States v. *Bryan*, 483 F.2d 88 (3d Cir. 1973) 15
United States v. *Callanan*, 810 F.2d 544 (6th Cir. 1987), cert. denied, No. 86-6735 (Oct. 5, 1987) 10

Cases – Continued: Page

United States v. *Carll*, 105 U.S. 611 (1882) 18
United States v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985) 15
United States v. *Debrow*, 346 U.S. 374 (1953) 18
United States v. *Feola*, 420 U.S. 671 (1975) 8
United States v. *Finazzo*, 704 F.2d 300 (6th Cir.), cert. denied, 463 U.S. 1210 (1983) 10
United States v. *Garner*, 837 F.2d 1404 (7th Cir. 1987) ... 12
United States v. *Gordon*, 812 F.2d 965 (5th Cir. 1987), certs. denied, No. 86-6801 (June 1, 1987) and No. 86-6870 (June 22, 1987) 15
United States v. *Hernandez*, 829 F.2d 988 (10th Cir. 1987) 12
United States v. *Kegler*, 724 F.2d 190 (D.C. Cir. 1983) ... 15
United States v. *Knigge*, 832 F.2d 1100 (9th Cir. 1987) ... 12
United States v. *Larkin*, 605 F.2d 1360 (1979), modified, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980) 11
United States v. *McCullah*, 745 F.2d 350 (1984) 10
United States v. *McGowan*, 423 F.2d 413 (4th Cir. 1970) . 10
United States v. *Meester*, 762 F.2d 867 (11th Cir.), cert. denied, 474 U.S. 1024 (1985) 15
United States v. *Miller*, 552 F. Supp. 827 (N.D. Ill. 1982), aff'd mem., 729 F.2d 1464 (7th Cir. 1984) 16
United States v. *Nickerson*, 606 F.2d 156 (6th Cir.), cert. denied, 444 U.S. 994 (1979) 10
United States v. *Polizzi*, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975) 10
United States v. *Redwine*, 715 F.2d 315 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984) 15
United States v. *Rodriguez*, 585 F.2d 1234 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980) 9
United States v. *Roselli*, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971) 15, 16
United States v. *Scandifia*, 390 F.2d 244 (2d Cir. 1968), vacated, 394 U.S. 310 (1969) 15
United States v. *Stanley*, 765 F.2d 1224 (5th Cir. 1985) ... 19
United States v. *Wylie*, 625 F.2d 1371 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981) 11
Whalen v. *United States*, 445 U.S. 684 (1980) 9

Constitution, statutes and rules: Page

U.S. Const.:
Amend. V (Double Jeopardy Clause) 6, 7, 8, 9
Amend. VI 7
Travel Act, 18 U.S.C. 1952 3
18 U.S.C. 2 15
18 U.S.C. 371 2-3
21 U.S.C. 846 8
21 U.S.C. 963 8
Fed. R. Crim. P.:
Rule 7(c)(1) 18
Rule 35 3
Fed. R. Evid.:
Rule 104(a) 13
Rule 801(d)(2)(E) 7, 11, 12, 13, 14

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1365

JOSEPH JOHN AIUPPA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1409

ANGELO LAPIETRA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1419

JOHN PETER CERONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1446

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-1543

MILTON JOHN ROCKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (87-1365 Pet. App. A1-A25) is reported at 830 F.2d 938.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1987. The petition for rehearing and rehearing en banc in No. 87-1543 was denied on December 15, 1987 (87-1543 Pet. App. C1). On February 12, 1988, Justice Blackmun granted an extension of time to and including March 14, 1988, within which to file a petition for a writ of certiorari, and the petition in No. 87-1543 was filed on that date. The petition for rehearing and rehearing en banc in No. 87-1365 was denied on December 16, 1987 (87-1365 Pet. App. B1), and the petition for a writ of certiorari in that case was filed on February 12, 1988. Petitions for rehearing and rehearing en banc in Nos. 87-1409, 87-1419, and 87-1446 were denied on December 23, 1987 (87-1409 Pet. App. B1; 87-1419 Pet. App. B1), and petitions for a writ of certiorari in Nos. 87-1409 and 87-1419 were filed on February 22, 1988 (a Monday). The petition for a writ of certiorari in No. 87-1446 was filed on February 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioners were each convicted on one count of conspiring to travel in interstate commerce and to use interstate commerce facilities with intent to promote an unlawful activity, in violation of 18

---

[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 87-1365.

U.S.C. 371; and on seven counts of traveling in interstate commerce or using interstate commerce facilities to promote unlawful activities, in violation of 18 U.S.C. 1952. Petitioners Aiuppa and Cerone were each sentenced to consecutive terms of imprisonment for four years on the conspiracy count and three and one-half years on each of the substantive Travel Act counts, for a total of 28 and one-half years' imprisonment. Petitioners Lombardo and LaPietra were each sentenced to consecutive terms of imprisonment for two years on each count, for a total of 16 years' imprisonment. Petitioner Rockman was sentenced to consecutive terms of imprisonment for three years on each count, for a total of 24 years' imprisonment. The court imposed cumulative fines of $10,000 on each count as to each petitioner. On February 2, 1988, the district court, pursuant to Fed. R. Crim. P. 35, modified the sentences of Lombardo, Rockman, and LaPietra by requiring their sentences on the conspiracy count (Count 1) to run concurrently with their sentences on the first substantive count (Count 2), but leaving unchanged the consecutive sentences on Counts 2 through 8. The court modified Cerone's sentence by requiring his sentence on Count 1 to run concurrently with his sentences on Counts 2 and 3, but leaving unchanged the consecutive sentences on Counts 2 through 8. The court delayed ruling on Aiuppa's Rule 35 motion. 87-1543 Pet. App. B1-B6. The court of appeals affirmed (Pet. App. A1-A25).

1. The evidence at trial is summarized in the opinion of the court of appeals. It shows that petitioners and others sought to maintain hidden financial and management interests in Las Vegas casinos, particularly the Stardust and the Fremont casinos, in violation of Nevada gaming laws. The casinos were owned by the Argent Corporation which, in turn, was owned by Allen R. Glick. Glick's

purchase of the casinos was financed by the Teamsters Union Central States Southeast and Southwest Areas Pension Fund. The conspirators achieved control of the casinos by helping Glick obtain the financing to purchase them and by placing two of their confederates, Frank Rosenthal and Carl Thomas, in management positions at Argent. The conspirators also maintained control over the Teamsters Union and its pension fund through Allen Dorfman, who secretly controlled the fund, and Roy Williams, a Teamsters official. Pet. App. A2-A3.

The conspirators exercised control over Argent and the Teamsters Union by virtue of their membership in organized crime groups in various Midwestern cities. Petitioner Aiuppa was the boss of the Chicago organized crime group, petitioner Cerone was its underboss, and petitioners LaPietra and Lombardo were members of that group. Petitioner Rockman was an associate of the Cleveland organized crime group; co-conspirator Nick Civella headed the Kansas City organized crime group; and co-conspirator Frank Balistrieri was the boss of the Milwaukee organized crime group. Pet. App. A3.

In early 1974, Balistrieri agreed to help Glick obtain a loan from the Teamsters pension fund to buy the Stardust and Fremont casinos. Balistrieri obtained the assistance of Civella and Rockman, who each controlled a trustee of the pension fund. After Glick obtained the loan and purchased the casinos, Balistrieri and others required Glick to appoint Frank Rosenthal to a management position at Argent. In that capacity, Rosenthal supervised the skimming of gambling proceeds from the casinos. Initially, the Kansas City, Milwaukee, and Cleveland groups shared the skimmed money. Shortly after the operation began, however, a dispute arose among the groups, and the Chicago group, including Aiuppa, Cerone, Lombardo,

and LaPietra, began sharing in the skimming proceeds. Pet. App. A3-A4.

Carl DeLuna, a member of the Kansas City group, maintained records of the conspirators' transactions and was the liaison between Las Vegas and Kansas City, and between Chicago and Kansas City. During the operation, LaPietra became DeLuna's contact with the Chicago group. Rockman was DeLuna's contact in the Cleveland group and also served as an intermediary in DeLuna's dealings with the Chicago group. Pet. App. A4.

The skimmed money was ordinarily delivered from Las Vegas to Chicago. LaPietra would deliver the money to a member of the Chicago group who, in turn, would deliver shares to DeLuna for the Kansas City group and to Rockman for the Cleveland group. Pet. App. A4.

During 1976-1979, the conspirators had several conversations in which they discussed replacing Rosenthal, who had become embroiled in widely publicized disputes with the Nevada licensing authorities. During the same period, Glick expressed reluctance to accept the conspirators' control of Argent through Rosenthal. Civella and DeLuna threatened to kill Glick if he did not acquiesce in their control of Argent through Rosenthal. Glick yielded to their demands. Sometime later, DeLuna told Glick that his "partners" were dissatisfied, and DeLuna threatened to kill Glick unless Glick sold Argent. In December 1979, Glick sold Argent to another company. Pet. App. A4-A5.

In October 1977, independent investment managers took control of the pension fund assets, hindering the conspirators' ability to control the fund. The conspirators, principally Lombardo and Allen Dorfman, held numerous strategy discussions concerning efforts to replace the independent managers with persons controlled by the conspirators. Between 1979 and 1981, the conspirators, in-

cluding Aiuppa, Cerone, Lombardo, and Rockman, supported Roy Williams to succeed Frank Fitzsimmons as Teamsters president and later supported Jackie Presser to succeed Williams, in an effort to secure influence within the Teamsters' Union. Pet. App. A5.

2. The court of appeals affirmed (Pet. App. A1-A25). The court first held (*id.* at A8) that although petitioners were indicted as aiders and abettors in the Travel Act counts, there was no error in submitting those charges to the jury on a theory of vicarious liability under *Pinkerton* v. *United States,* 328 U.S. 640 (1946). Next, applying the analysis in *Blockburger* v. *United States,* 284 U.S. 299 (1932), the court concluded (Pet. App. A9-A13) that the Double Jeopardy Clause does not forbid separate convictions on the conspiracy and substantive Travel Act counts—even where, as here, liability on the substantive offenses is predicated on *Pinkerton.* The court rejected (Pet. App. A13-A15) on harmless error grounds petitioners' challenge to a portion of the jury charge that stated that "the presumption is that every person knows what the law forbids, and what the law requires to be done" (*id.* at A13). The court next found (*id.* at A17-A18) sufficient evidence to support the admission of the co-conspirator statements in the case. In reaching that conclusion, the court applied this Court's recent decision in *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987), but also found "direct evidence of the conspiracy and [petitioners'] participation in it" (Pet. App. A18 n.10). The court then upheld (*id.* at A20-A21) the instructions on conspiracy, rejecting as meritless the claim that the trial court had permitted the jury to convict on the conspiracy count if it found evidence that petitioners had aided and abetted a substantive offense. The court next determined (*id.* at A21) that the evidence, although circumstantial,

was sufficient to show that petitioner Cerone had traveled from Chicago, Illinois, to Kansas City, Missouri, for illegal purposes, as alleged in Count 7 of the indictment. The court also concluded (*id.* at A23) that the substantive Travel Act counts in the indictment were sufficient, noting that the indictment contained lengthy allegations of fact and provided ample notice of the acts with which petitioners were charged. Finally, the court held (Pet. App. A24-A25) that petitioner Rockman was not prejudiced by the trial court's exclusion of certain defense testimony regarding Glick's sale of his business interests in 1979—testimony that Rockman had offered purportedly to show that post-1979 co-conspirator statements were not made in the course of the conspiracy, as is required by Fed. R. Evid. 801(d)(2)(E).

ARGUMENT

1. Petitioners first argue (87-1365 Pet. 11-18) that the trial court violated the Fifth and Sixth Amendments when it gave the following instruction (Pet. App. A13):

> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids, and what the law requires to be done.

The court of appeals did not approve of that instruction. Rather, it assumed (Pet. App. A15) that the instruction was erroneous. Applying this Court's decision in *Rose* v. *Clark*, 478 U.S. 570 (1986), however, the court of appeals held that on the present record the error was harmless.

Petitioners acknowledge (87-1365 Pet. 17) that *Rose* v. *Clark, supra,* applies, and they do not take issue with the court of appeals' analysis of the record. They simply con-

tend that it is "unclear" (87-1365 Pet. 18) whether the court of appeals found the challenged instruction to be harmless beyond a reasonable doubt. That claim is meritless. Although the court of appeals did not articulate the harmless error standard in so many words, it expressly adopted the analysis employed by this Court in *Rose* v. *Clark, supra.* There is no reason to believe that it did so erroneously.

2. Next, petitioners contend (87-1409 Pet. 8-19; 87-1419 Pet. 18-22) that the Double Jeopardy Clause prohibits separate convictions and sentences for conspiracy and substantive violations of the Travel Act. That contention is mistaken.

This Court has long held that separate convictions and punishments are permissible for ordinary substantive offenses and conspiracies to commit those offenses. See *United States* v. *Feola,* 420 U.S. 671, 693 (1975); *Callanan* v. *United States,* 364 U.S. 587 (1961). That rule is based on the so-called *Blockburger* test, see *Blockburger* v. *United States,* 284 U.S. 299 (1932), which is the principal device for determining whether different statutes permit the imposition of separate judgments and cumulative punishment. In *Albernaz* v. *United States,* 450 U.S. 333 (1981), this Court reaffirmed the *Blockburger* test and held that absent a clear expression of congressional intent to the contrary, consecutive sentences under separate statutory provisions are appropriate where each provision requires proof of at least one fact not required by the other. Thus, the Court in *Albernaz* permitted the imposition of consecutive sentences for violations of 21 U.S.C. 963, charging conspiracy to import marijuana, and 21 U.S.C. 846, charging conspiracy to distribute marijuana. Because there was no contrary expression of legislative intent, and because each offense required proof of at least one element not required by the other, the Court upheld

cumulative punishments, even though the proof at trial supporting the two conspiracy charges was identical, see *United States* v. *Rodriguez*, 585 F.2d 1234, 1239 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980).[2]

Under that standard, a conspiracy to violate the Travel Act and a substantive violation of the Act are separate offenses and may be separately prosecuted and punished. A conspiracy requires proof of an agreement, while a substantive offense does not; a substantive offense requires proof that the offense was consummated, while a conspiracy does not. The courts of appeals have uniformly

---

[2] Citing this Court's decision in *Whalen* v. *United States*, 445 U.S. 684 (1980), petitioners contend (87-1409 Pet. 12-13; 87-1419 Pet. 19-21) that the analysis under *Blockburger* should focus not on the elements of the offense but on the evidence introduced at trial. The *Whalen* case does not alter the traditional test. That case involved a prosecution for the offenses of rape and felony murder. Under the governing statute, felony murder could be committed in the course of any one of six specified felonies, including rape. The defendant was separately punished for both the rape and the felony murder committed in the course of the rape. The government contended that because felony murder could be proved by establishing a predicate other than rape, it followed that under *Blockburger* rape and felony murder could be separately prosecuted and punished. Applying the *Blockburger* test, this Court disagreed. The Court reasoned that the felony murder statute—which listed the six predicate felonies in the alternative—was functionally indistinguishable from a statute that separately proscribed six different species of felony murder under six statutory provisions. The Court therefore regarded each category of felony murder as, in substance, a separate offense, each with its own lesser-included predicate. Under the Court's analysis, therefore, all the elements of rape were included in the offense of felony murder by rape, and under *Blockburger* cumulative punishments would violate the Double Jeopardy Clause. In reaching that conclusion, however, the Court in *Whalen* was careful to point out that it was "not in this case apply[ing] the *Blockburger* rule to the facts alleged in a particular indictment" (445 U.S. at 694 n.8).

reached the same conclusion. See, *e.g.*, *United States* v. *Nickerson*, 606 F.2d 156, 159 (6th Cir.), cert. denied, 444 U.S. 994 (1979); *United States* v. *Polizzi*, 500 F.2d 856, 897 & n.3 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *United States* v. *McGowan*, 423 F.2d 413, 415-417 (4th Cir. 1970).[3]

The analysis is no different even where, as here, petitioners' convictions on the substantive counts may have rested, under *Pinkerton*, on their participation in the conspiracy. To be sure, under *Pinkerton* each co-conspirator becomes liable for the substantive violations committed by his confederates in furtherance of the conspiracy. In that sense, the conspiratorial agreement is a necessary component of substantive liability under the *Pinkerton* theory. But conspiracy does not, for that reason, become a lesser-included offense of the substantive violation: the latter still requires a completed substantive offense, while the former requires the commission of an overt act that may have nothing to do with the substantive act that gives rise to *Pinkerton* liability. Under *Blockburger*, therefore, con-

[3] Contrary to petitioners' contention (87-1409 Pet. 13-14; 87-1419 Pet. 19-21), the court of appeals' decision does not conflict with any decision of the Sixth Circuit. Indeed, the Sixth Circuit's decision in *Nickerson* is in accord with the decision reached by the court below. To be sure, the Sixth Circuit, in cases such as *Pandelli* v. *United States*, 635 F.2d 533 (1980), and *United States* v. *Austin*, 529 F.2d 559 (1976), has focused upon the actual evidence submitted at trial instead of the elements of the offenses. In a more recent case, however, the Sixth Circuit recognized that "[t]he *Austin* approach has not fared well in the other circuits" (*United States* v. *McCullah*, 745 F.2d 350, 355 n.6 (1984)), and it emphasized that under *Blockburger* separate prosecutions are permissible "when each offense requires proof of a fact that the other does not" (745 F.2d at 355). Moreover, in *United States* v. *Callanan*, 810 F.2d 544, 545-548 (1987), cert. denied, No. 86-6735 (Oct. 5, 1987), the Sixth Circuit reiterated that the *Blockburger* test focuses only on the statutory elements of the charged offenses. See also *United States* v. *Finazzo*, 704 F.2d 300, 305 (6th Cir.), cert. denied, 463 U.S. 1210 (1983).

spiracy and *Pinkerton* substantive liability are separate offenses and may be separately prosecuted and punished. Indeed, in *Pinkerton* itself, this Court upheld separate convictions and punishments for conspiracy and substantive offenses, even though liability on the substantive offenses was predicated on the doctrine of vicarious liability announced in *Pinkerton*. See also *United States* v. *Wylie*, 625 F.2d 1371, 1380-1382 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981).[4]

3. Petitioners claim (87-1409 Pet. 20-24) that this Court's decision in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), should not be retroactively applied. They assert that the court of appeals therefore erred when it relied on *Bourjaily* in finding sufficient evidence to support the admission of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). That contention has no merit.

In the *Bourjaily* case, this Court held that in determining whether a co-conspirator's statement may be admitted pursuant to Rule 801(d)(2)(E), a trial court may consider the statement itself, as well as other "independent" evidence, in assessing whether there was a conspiracy and whether the defendant and the hearsay declarant were members of that conspiracy. The courts of appeals have uniformly followed *Bourjaily* in resolving Rule

---

[4] The Fifth Circuit's decision in *United States* v. *Larkin*, 605 F.2d 1360 (1979), modified, 611 F.2d 585, cert. denied, 446 U.S. 939 (1980), is not in conflict. There, the court held that the government could retry a defendant for conspiracy, following a trial in which the jury had been deadlocked on the conspiracy count but had acquitted the defendant on a series of substantive counts in which liability was based on *Pinkerton*. Although the court suggested in dicta (605 F.2d at 1367) that conspiracy may be a lesser-included offense of a substantive offense based on *Pinkerton*, the court did not resolve the issue due to "the procedural posture of th[e] case."

801(d)(2)(E) issues that have arisen since the *Bourjaily* case was decided. See, *e.g.*, *United States* v. *Blackmon*, No. 86-1427 (2d Cir. Feb. 9, 1988), slip op. 6435; *United States* v. *Garner*, 837 F.2d 1404, 1415-1416 (7th Cir. 1987); *United States* v. *Knigge*, 832 F.2d 1100, 1103 (9th Cir. 1987); *United States* v. *Hernandez*, 829 F.2d 988, 993-995 (10th Cir. 1987). Petitioners offer no reason to adopt a different rule.

Moreover, there is no justification for refusing to apply the principles of *Bourjaily* in this case. First, the *Bourjaily* Court did not purport to be creating a new rule, contrary to one on which the defendants had relied. The *Bourjaily* Court simply construed a rule of evidence that has been in effect since 1975. And a rule of evidence of that sort is unlike a substantive rule of criminal liability on which individuals might rely in shaping their conduct. Petitioners do not contend—nor could they—that they engaged in the conduct at issue in this case in reliance on previous circuit law limiting the admissibility of co-conspirator declarations against them.

It would be pointless not to apply *Bourjaily* to this case. If this Court were to hold that the principles of *Bourjaily* should not have been applied on appeal, and if the Court were to reverse on that ground, that would normally entitle petitioners only to a new trial. At the new trial the district court would be obligated to apply the standard announced in *Bourjaily*. There is no reason to set aside a court of appeals' decision where, at any new trial, the legal principle adopted by the court of appeals would necessarily be applied by the trial court as well.

In any event, the present case is an inappropriate vehicle for resolving the issue of the "retroactive" application of *Bourjaily*. The district court (see 87-1409 Pet. 6), affirmed by the court of appeals (87-1365 Pet. App. A18 n.10),

found that there was sufficient independent evidence to justify submitting the co-conspirator statements to the jury. Petitioners' fact-bound challenge to that finding does not warrant further review. See *Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 317-318 & n.5 (1985).

4. Petitioner Rockman contends (87-1543 Pet. 12-18) that the trial court improperly denied him the opportunity to introduce certain evidence that was intended to show that the conspiracy charged in the indictment ended in 1979 and thus that co-conspirator statements made after 1979 should not have been admitted under Fed. R. Evid. 801(d)(2)(E). The court of appeals acknowledged (Pet. App. A25) that it was "troubled" by the exclusion of that evidence, but it held that on the present record the exclusion did not constitute reversible error. That decision is clearly correct.[5]

During the defense case, Rockman attempted to show that the conspiracy charged in the indictment ended on December 26, 1979, when Glick sold his interest in the casinos. At trial, as here (87-1543 Pet. 6-11), Rockman contended that "[t]he object of the conspiracy was inextricably tied to the * * * 'gaming interests of Allen R. Glick' " (*id.* at 7). He asserted that when Glick lost his interest in the casinos, the conspiracy necessarily came to an end. In support of that theory, Rockman called Shannon Bybee as an expert on Nevada gaming laws. Rockman hoped to establish through Bybee's testimony that although Glick held a mortgage on the casinos after he

---

[5] The court of appeals did not dispute petitioner's right to offer evidence that the conspiracy ended in 1979. Thus, this case does not present the question whether a defendant may offer evidence bearing on the trial court's preliminary determination, pursuant to Fed. R. Evid. 104(a), whether the factual predicates for the admission of a co-conspirator's statement have been established.

sold them, his stake was insufficient under Nevada law to constitute a financial interest in the casinos. The trial court permitted Rockman to ask Bybee various hypothetical questions concerning the circumstances under which Nevada gaming authorities would require that a mortgage holder obtain a gaming license. The court refused, however, to permit Rockman to ask Bybee three hypothetical questions in that line, holding that the proposed questions omitted material facts and were therefore misleading in the form propounded by Rockman. The court advised Rockman that he could ask those questions if he included the omitted material facts. Rockman failed to do so. Gov't C.A. Supp. Br. 11.

The trial court acted well within its discretion in refusing to permit Rockman to put those improper questions to the witness. In any event, as the court of appeals concluded (Pet. App. A25), any error in excluding Bybee's proposed testimony was entirely harmless. A fair reading of the indictment shows that the object of the conspiracy was to secure and maintain a financial interest in Glick's casinos—an object that did not abate when Glick gave up his personal stake in the operation. See C.A. App. 14. Thus, even if Rockman had succeeded in establishing that Glick had ended his financial interest in the casinos in 1979, the trial court was nevertheless correct in concluding that the conspiracy continued for several years thereafter and that co-conspirator statements made after 1979 were admissible under Fed. R. Evid. 801(d)(2)(E).

5. Petitioners contend (87-1419 Pet. 10-16; 87-1446 Pet. 6-15) that because they were named in the substantive Travel Act counts as aiders and abettors (except for Count 7, in which petitioner Cerone was named as a principal), the trial court erred when it submitted those counts to the jury on the theory that petitioners were liable as principals under *Pinkerton v. United States*, 328 U.S. 640 (1946).

In essence, petitioners claim that there was a fatal variance between the charges in the indictment and the theory on which the case was submitted to the jury. That claim is meritless.

The courts routinely hold that a defendant may be indicted as a principal but convicted on evidence showing that he aided and abetted the substantive offense.[6] See, *e.g., United States* v. *Gordon,* 812 F.2d 965, 969 (5th Cir. 1987), certs. denied, No. 86-6801 (June 1, 1987) and No. 86-6870 (June 22, 1987); *United States* v. *Cook,* 745 F.2d 1311, 1315 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985); *United States* v. *Kegler,* 724 F.2d 190, 201 & n.15 (D.C. Cir. 1983) (citing cases). The converse is also true: a defendant may be indicted as an aider and abettor but convicted on evidence showing him to be a principal. See, *e.g., United States* v. *Bryan,* 483 F.2d 88, 94-97 (3d Cir. 1973) (en banc); *United States* v. *Bell,* 457 F.2d 1231, 1235 (5th Cir. 1972); *United States* v. *Scandifia,* 390 F.2d 244, 250 n.6 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969). Consistent with that general principle, the courts have regularly held that defendants may be convicted as principals under *Pinkerton,* even though they were indicted as aiders and abettors. See, *e.g., United States* v. *Meester,* 762 F.2d 867, 878 (11th Cir.), cert. denied, 474 U.S. 1024 (1985); *United States* v. *Redwine,* 715 F.2d 315, 322 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); *United States* v. *Roselli,* 432 F.2d 879, 894-895 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). In the *Meester* case, for example, the court rejected the same claim pressed by petitioners, noting (762 F.2d at 878) that "[t]his is essentially an argument that the *Pinkerton* instruction constituted a variance from the charges con-

---

[6] Indeed, the aiding and abetting statute, 18 U.S.C. 2, specifically provide that aiders and abettors are punishable as principals.

tained in the indictment. To benefit from any such variance, the appellants would have to demonstrate prejudice." Accord *Roselli,* 432 F.2d at 895.

In the present case, petitioners do not suggest how they were prejudiced, if at all, by the fact that the substantive Travel Act counts were submitted to the jury on a *Pinkerton* theory of liability. As in the *Roselli* case (see 432 F.2d at 895), petitioners were indicted on conspiracy charges, and thus had notice of, and an opportunity to contest, the essential element of *Pinkerton* liability. Moreover, the only additional factor under *Pinkerton*—whether the substantive acts were in furtherance of the conspiracy—"was not subject to argument in the context of this case" (*Roselli*, 432 F.2d at 895). In the absence of any showing of prejudice, petitioners' variance contention is insufficient.[7]

6. Petitioner Lombardo claims (87-1446 Pet. 15-16) that the instructions on the law of conspiracy were erroneous, in that the trial court "fail[ed] to limit the aiding and abetting instruction to the substantive counts" (*id.* at 15). The court of appeals examined the instructions and rejected petitioner's claim (Pet. App. A20-A21). It noted that the trial court had "correctly instructed the jury on the elements of conspiracy" (*id.* at A20) and that the aiding and abetting instructions "refer[red] to the substantive

---

[7] Petitioners' contention (87-1419 Pet. 11-13) that the court of appeals' decision conflicts with *United States* v. *Bright,* 630 F.2d 804 (5th Cir. 1980); *United States* v. *Alsobrook,* 620 F.2d 139 (6th Cir.), cert. denied, 449 U.S. 843 (1980); and *United States* v. *Miller,* 552 F. Supp. 827 (N.D. Ill. 1982), aff'd mem., 729 F.2d 1464 (7th Cir. 1984) (Table), is without merit. None of those cases involved the question whether a defendant who is indicted as an aider and abettor may nevertheless be convicted on evidence showing that he was a principal under *Pinkerton*.

Travel Act offenses, not conspiracy" (*id.* at A21). Lombardo offers no reason to reject that conclusion.

7. Petitioners contend (87-1419 Pet. 6-10; 87-1446 Pet. 17-20) that the Travel Act counts in the indictment did not state an offense. That fact-bound challenge merits no review.

Count 7 of the indictment (C.A. App. 37-38), which is representative of each of the seven substantive Travel Act counts, alleged, in pertinent part, that on or about January 11, 1979, petitioner Cerone traveled in interstate commerce from Chicago, Illinois, to Kansas City, Missouri, for the purpose of meeting with Carl Civella, Nick Civella, and Carl DeLuna

> to discuss matters pertinent to the sale of or transfer of ownership of the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: a business enterprise involving the management, operation, conducting and carrying on of gambling operations of licensed gaming establishments in Las Vegas, Nevada, that is, the gaming interests of Allen R. Glick, including the Stardust and Fremont casinos, and the indirect receipt of moneys played therein, by persons who were not licensed by, and whose interest in said gaming establishments had been concealed from the Nevada Gaming Control Act * * * and regulations of the Nevada Gaming Commission * * * and thereafter did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of

> said unlawful activity and [petitioners and others] did aid, abet, counsel, command, induce and procure the commission of said offense.

Under Fed. R. Crim. P. 7(c)(1) an indictment need only be "a plain, concise and definite written statement of the essential facts constituting the offense charged." The rule was "designed to eliminate technicalities" and is "to be construed to secure simplicity in procedure." *United States* v. *Debrow,* 346 U.S. 374, 376 (1953). An indictment is ordinarily sufficient if it contains the elements of the offense, fairly informs the defendant of the charge, and enables him to avoid a future prosecution for the same offense on double jeopardy grounds. *United States* v. *Bailey,* 444 U.S. 394, 414 (1980); *Hamling* v. *United States,* 418 U.S. 87, 117-118 (1974). To meet that standard, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished' " (*Hamling,* 418 U.S. at 117, quoting *United States* v. *Carll,* 105 U.S. 611, 612 (1882)).[8]

An indictment under the Travel Act requires an allegation of " '(1) [travel in] interstate commerce or use of an interstate facility, (2) with intent to promote an unlawful activity, and (3) a subsequent overt act in furtherance of that unlawful activity.' " *United States* v. *Brown,* 770 F.2d

---

[8] As this Court has put it, " 'the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.' " *Armour Packing Co.* v. *United States,* 209 U.S. 56, 84 (1908) (citation omitted).

768, 772 (9th Cir.) (citation omitted), cert. denied, 474 U.S. 1036 (1985). In this case, each substantive Travel Act count tracked the statutory language and stated each of the prescribed elements. "Because the Travel Act fully and unambiguously sets out the essential elements of the offense, indictments drafted substantially in its language are sufficient." *United States* v. *Stanley,* 765 F.2d 1224, 1239-1240 (5th Cir. 1985). Accord *Turf Center, Inc.* v. *United States,* 325 F.2d 793, 796, 797 (9th Cir. 1963).

8. Petitioner Cerone contends (87-1419 Pet. 16-18) that the evidence was insufficient to support his Travel Act conviction on Count 7. Count 7 alleged that on or about January 11, 1979, Cerone traveled from Chicago, Illinois, to Kansas City, Missouri, to meet with DeLuna, Carl Civella, and Nick Civella, to discuss the sale of the Stardust and Fremont casinos (C.A. App. 37-38). The court of appeals conducted a meticulous review of the record and concluded that the evidence on that count was sufficient (Pet. App. A21). As the court explained, the evidence showed that Cerone lived in Chicago. On January 11, 1979, FBI agents observed Carl DeLuna pick up two men at the Kansas City airport and take them to Anthony Civella's residence. DeLuna later drove Cerone back to the airport in the same car that was observed earlier. Cerone was then seen leaving Kansas City and arriving at the Chicago airport. In addition, notes taken by DeLuna and admitted at trial recorded that DeLuna met with Cerone and Civella on January 11, 1979, to discuss negotiations to buy Argent. That evidence, the court of appeals concluded (*ibid.*), "would enable the jury to infer that Cerone traveled from Chicago, that DeLuna picked up Cerone at the Kansas City airport for the purpose of meeting with Civella, and they discussed their illegal operation."

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
THOMAS E. BOOTH
Attorney

APRIL 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988 – 202 037/60400